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No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

*v.*

FORT KNOX DEPENDENT SCHOOLS AND
FORT KNOX TEACHERS ASSOCIATION

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether compensation of Federal employees whose rates of compensation are not specifically provided for by law is a negotiable "condition of employment" under 5 U.S.C. 7103(a)(14), which defines the term in relevant part as "personnel policies, practices, and matters * * * affecting working conditions."

2. Section 241 of 20 U.S.C. requires in relevant part that compensation of Federal dependents schools employees be set without reference to the Federal pay-setting laws that establish the compensation of most Federal employees; and that to the extent practicable the education provided by and average per pupil costs for Federal dependents schools be comparable to schools in the local community. The second question presented in this case is whether a bargaining proposal concerning overtime compensation for teachers at the Fort Knox Dependents Schools is inconsistent with Section 241.

3. Whether a Department of the Army regulation requiring, to the extent practicable, equality of salary schedules of Army dependents school and local school employees is a nondiscretionary implementation of a mandate of 20 U.S.C. 241, so that the Army regulation is supported by a "compelling need" under 5 U.S.C. 7117(b) and can therefore bar negotiations on a proposal contrary to the regulation.

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*v.*

FORT KNOX DEPENDENT SCHOOLS AND
FORT KNOX TEACHERS ASSOCIATION

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-15a) is reported at 875 F.2d 1179. The decision and order of the Federal Labor Relations Authority (App., *infra*, 18a-35a) is reported at 25 F.L.R.A. 1119.[1]

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[1] The court of appeals' decision incorrectly identifies (App., *infra*, 2a) the Authority's decision under review as 25 F.L.R.A. 203 rather than 25 F.L.R.A. 1119.

## JURISDICTION

The judgment of the court of appeals was entered on May 11, 1989. A petition for rehearing and suggestion for rehearing en banc filed by the Federal Labor Relations Authority was denied on August 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1988), and 20 U.S.C. 241 (1982), are reproduced in the appendix (App., *infra*, 36a-66a).

## STATEMENT

1. The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management relations in the Federal service.[2] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. 7105(a)(1), (2); see also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*,

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[2] The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the Federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

464 U.S. 89, 93 (1983). The Authority may also "take such other actions as are necessary and appropriate to effectively administer the provisions of [the Statute]." 5 U.S.C. 7105(a)(2)(I). The Authority is also empowered to engage in formal rulemaking pursuant to 5 U.S.C. 7134, and to "provide leadership in establishing policies and guidance" relating to Federal sector labor relations matters, pursuant to 5 U.S.C. 7105(a)(1). *BATF* v. *FLRA*, 464 U.S. at 93. The Authority may petition for enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including Federal agencies, who are aggrieved by certain types of Authority orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

a. Under the Statute, a Federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14). An exception to this statutory definition of the phrase "conditions of employment" is "matters * * * specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C).

The Statute also expressly excludes certain matters from the general obligation to bargain. There is no duty to bargain over the rights the Statute reserves to management as nonnegotiable. 5 U.S.C. 7106. One such management right is the right "to determine the * * * budget * * * of the agency." Further,

there is no duty to bargain over proposed contract language which is inconsistent with a Federal law, or with a government-wide rule or regulation. 5 U.S.C. 7117(a)(1). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

Additionally, although strikes in the Federal sector are forbidden under 5 U.S.C. 7116(b)(7), Congress established the Federal Service Impasses Panel ("FSIP" or "Panel"). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. Either party may request the Panel to conduct an inquiry into a bargaining impasse. If, after the Panel makes initial recommendations to the parties they still cannot reach a settlement, the Panel may hold hearings and take whatever action is necessary and not inconsistent with the Statute to resolve the impasse. 5 U.S.C. 7119(c)(5)(B). See generally 5 C.F.R. 2471.1 to 2471.12. When the Panel imposes a term on the parties it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Panel does not have authority to make determinations on assertions of nonnegotiability that are not clearly resolved by Authority precedent. The resolution of negotiability issues is made by the Authority.

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal was within the duty to bargain established by the

Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a Federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegations of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12). *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

b. Fort Knox Dependent Schools ("Fort Knox" or "Army") is part of the network of dependents schools in the United States established under the authority of section 6, title I of Pub. L. No. 81-874 (codified at 20 U.S.C. 241), which provides a free public education for eligible dependent children of military and civilian personnel who reside on Federal property. For most Federal employees Congress set specific wage and salary scales and classifications. However, Congress has not established specific wage and salary scales for dependents schools employees. Section 241(a) provides that for purposes of providing a free public education, "personnel may be employed and the compensation, tenure, leave, hours of work and other incidents of the employment relationship *may be fixed without regard to the Civil Service Act and rules* * * *" and specified portions of Title 5 of the United States Code. 20 U.S.C. 241(a) (emphasis added).

Additionally, Section 241(a) requires the dependents schools to ensure that education at its schools is "comparable to free public education provided for children in comparable communities in the state." 20 U.S.C. 241(a). In providing a comparable education, dependents schools must comply with Section 241(e) which provides that "to the maximum extent practicable" the Secretary shall limit total payments made for such education within the Continental United States to an amount per pupil which does not exceed the amount spent in comparable communities in the State in which the school is located. 20 U.S.C. 241(e).

2. During contract negotiations between Fort Knox Teachers Association ("union"), which represents the teachers employed by Fort Knox and the Army, the union submitted the following proposal for collective bargaining:

> Overtime at time and one half shall be the rate of compensation to any teacher performing bus chaperone duty which goes beyond the normal school day. Overtime compensation shall be provided all employees performing such duty, whether on a voluntary or roster basis.

(App., *infra*, 18a-19a). The Army alleged that the proposal was nonnegotiable and refused to bargain on it (App., *infra*, 19a). The union sought review by the Authority of the Army's allegation of nonnegotiability under Section 7117 of the Statute, 5 U.S.C. 7117(c) (App., *infra*, 18a).

Before the Authority, the Army asserted three bases for contending that the proposal was nonnegotiable (App., *infra*, 19a). First, the Army argued that the proposal conflicted with Federal laws, specifically 20 U.S.C. 241 and 5 U.S.C. 5542 (App.,

*infra*, 19a). Second, the Army argued that the proposal conflicted with a regulation (AR 352-3) for which a compelling need exists because it implements, in an essentially nondiscretionary manner, the mandate of Congress in 20 U.S.C. 241 (App., *infra*, 19a). Finally, the Army claimed that the proposal did not concern conditions of employment within the meaning of Section 7103(a)(14) of the Statute (App., *infra*, 19a). The union responded before the Authority that the proposal did not violate Federal law or regulation and that it concerned a negotiable condition of employment (App., *infra*, 19a).

The Authority (Chairman Calhoun, dissenting) rejected the Army's arguments and found the proposal negotiable (App., *infra*, 24a-35a). The Authority first held that the proposal did not conflict with 20 U.S.C. 241 (App., *infra*, 24a-27a). The Authority stated that it has previously held that Section 241 vests the Army with discretion to set the compensation of its employees without regard to the Federal statutes which specifically provide for the compensation of most Federal employees (App., *infra*, 26a-27a). The Authority noted that the proposal would not, of itself, cause the Army to exceed the limitations on the total per pupil cost of providing a comparable education, since compensation is only one aspect of total cost (App., *infra*, 26a-27a). Moreover, the Authority found nothing in the language of Section 241 or its legislative history indicating congressional intent to restrict an agency's discretion concerning the adoption of particular employment practices relating to compensation, here overtime (App., *infra*, 27a). The Authority also rejected the Army's argument that the proposal conflicted with 5 U.S.C. 5542 (App., *infra*, 27a-28a). The Authority noted that Section 241

specifically exempts the employees involved from coverage under 5 U.S.C. 5542 and therefore found this provision inapposite (App., *infra*, 27a-28a).

Second, the Authority rejected the Army's claim that the proposal conflicts with a provision of its regulation, designated AR 352-3, for which a compelling need exists (App., *infra*, 28a-29a). Under the Statute, 5 U.S.C. 7117(a)(2), there is no duty to bargain over matters which are the subject of agency regulations if the Authority finds a compelling need for the regulation. In Authority regulations which set forth the illustrative criteria for determining compelling need, the relevant provision, 5 C.F.R. 2424.11, states that a compelling need exists for an agency regulation when the regulation implements an essentially nondiscretionary mandate of law. The Army's regulation, captioned "Compensation factors," states in relevant part that education provided "will be considered comparable to free public education offered by selected communities in the State when the following portions are, to the maximum extent practicable, equal" (App., *infra*, 28a). The regulation then lists, among other items, "salary schedules" (App., *infra*, 28a).

The Authority found that the Army had not established a compelling need under Section 2424.11(c) of the Authority's regulations, noting that the agency's argument on this point was essentially based on the same interpretation of the legislative history of Section 241 which had already been rejected by the Authority in this case and previous cases (App., *infra*, 29a). The Authority stated, as it had previously, that the Army had not established that the language of 20 U.S.C. 241 or the intent of Congress in enacting the provisions in question mandates adoption of any spe-

cific employment or compensation practices (App., *infra*, 29a). Consequently, the Authority concluded that the agency had not demonstrated that a compelling need exists for its regulation to bar negotiations on this proposal (App., *infra*, 29a).

Third, the Authority found that the overtime pay proposal concerned a negotiable condition of employment about which the Army has discretion pursuant to 20 U.S.C. 241 (App., *infra*, 29a-30a). In holding that the Army has discretion to negotiate on pay matters under Section 241, the Authority relied on its lead decision concerning the negotiability of employee pay, *American Fed'n of Gov't Employees, Local 1897 and Dep't of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. 377 (1986) (*Eglin*) (App., *infra*, 30a). In *Eglin* the Authority held that pay matters are negotiable conditions of employment under the Statute, to the extent that the matter proposed is not specifically provided for by law and is within agency discretion; and the bargaining proposal is not otherwise inconsistent with law or appropriate regulation. For the foregoing reasons the Authority found the union's proposal to be within the agency's duty to bargain, and ordered the Army to bargain on the proposal (App., *infra*, 30a-31a).

3. A panel of the Sixth Circuit, with one judge dissenting, granted the Army's petition for review and reversed the Authority's decision (App., *infra*, 1a-8a). The majority held that employee pay is not a "condition of employment" as defined in Section 7103(a)(14) of the Statute (App., *infra*, 4a-6a). In this connection, the majority noted that compensation is not expressly referenced in the Statute as a bargainable subject (App., *infra*, 4a). Following the same reasoning as the Third Circuit in *Department*

*of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409 (3d Cir. 1988), the court compared the Statute's language to the NLRA, 29 U.S.C. 158 (d), which does expressly reference wages as a mandatorily bargainable matter (App., *infra*, 4a-5a). The majority also referenced the Statute's legislative history and stated its agreement with the Third Circuit's view that Congress intended to bar negotiations on pay (App., *infra*, 5a). The court also noted that Congress gave agencies control over their budgets, and to allow collective bargaining over pay matters would be inconsistent with this right (App., *infra*, 6a).

The majority then noted the existing precedent in other circuits on the same issue (App., *infra*, 6a-8a). While recognizing the contrary result reached by the Eleventh Circuit in *Fort Stewart Schools* v. *FLRA*, 860 F.2d 396 (11th Cir. 1988), cert. granted, No. 89-65 (Oct. 2, 1989) the court concluded that the Eleventh Circuit's rationale in that case was unconvincing (App., *infra*, 7a). Likewise the court found the Second Circuit's decision in *West Point Elementary School Teachers Association* v. *FLRA*, 855 F.2d 936 (2d Cir. 1988), to be flawed (App., *infra*, 7a-8a). The majority viewed the decisions of the Fourth Circuit on the issue to be contradictory, noting that the Fourth Circuit's decision in *United States Department of Defense Dependent Schools, Ft. Bragg, North Carolina* v. *FLRA*, 838 F.2d 129 (4th Cir. 1988), finding pay to be a condition of employment, was subsequently vacated. The court below also noted that the Fourth Circuit's decision in *Nuclear Regulatory Commission* v. *FLRA*, 859 F.2d 302 (4th Cir. 1988), rev'd en banc, 879 F.2d 1225 (4th Cir. 1989) (*NRC*), was also vacated pending en banc considera-

tion (App., *infra*, 8a).[3] Thus, the majority concluded that there was no "majority" appellate court view on the issue (App., *infra*, 8a).

Judge Boggs, in dissent, intially determined that great deference was due the Authority's interpretation of its Statute (App., *infra*, 10a). While noting that decisions of the Third and District of Columbia Circuits had found wages exempt from bargaining under the Statute, the dissent concluded that in those cases the application of another law, the Prevailing Rate Systems Act of 1972, Pub. L. No. 92-392, 86 Stat. 564 (codified at 5 U.S.C. 5341-5449), was what rendered wages nonnegotiable, and not the Statute (App., *infra*, 11a). As such, Judge Boggs found reliance on those cases to be inappropriate (App., *infra*, 11a-12a). Instead Judge Boggs found the decisions of the Second and Eleventh Circuits in *West Point Elementary School Teachers Ass'n* v. *FLRA*, 855 F.2d 936 (2d Cir. 1988); and *Fort Stewart*

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[3] Subsequent to the Sixth Circuit's decision, the Fourth Circuit issued its en banc decision in *NRC* voting six to four to reverse the Authority's holding that the pay matter there involved was negotiable. *Nuclear Regulatory Commission* v. *FLRA*, 879 F.2d 1225 (4th Cir. 1989) (en banc). The *NRC* majority held that employee pay is not a "condition of employment" as defined in Section 7103(a)(14) of the Statute. Five of the six judges voting to reverse the Authority next held that the proposal interfered with the agency's budget right under Section 7106(a)(1) of the Statute. The same five judges held that the Authority erred in finding that the proposal was not inconsistent with Section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d). The union-intervenor and the Authority in *NRC* have petitioned the Court for a writ of certiorari to the Fourth Circuit's judgment. *National Treasury Employees Union* v. *FLRA*, petition for cert. pending, No. 89-198; *FLRA* v. *National Treasury Employees Union*, petition for cert. pending, No. 89-562.

*Schools* v. *FLRA*, 860 F.2d 396 (11th Cir. 1988), cert. granted, No. 89-65 (Oct. 2, 1989), to be correct and relied on the reasoning in those cases to find bargaining over pay matters for employees covered by 20 U.S.C. 241 to be negotiable (App., *infra*, 12a-15a).

## REASONS FOR GRANTING THE PETITION

In *Fort Stewart Schools* v. *FLRA*, cert. granted, No. 89-65 (Oct. 2, 1989), the Solicitor General, on behalf of the Fort Stewart Schools, has sought and obtained review in this Court of a decision of the Eleventh Circuit involving the same issues raised in the petition in the instant case.[4] The Eleventh Cir-

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[4] In both *Fort Stewart Schools* v. *FLRA*, *supra*, and the instant case the courts of appeals were called upon to review the Authority's determination that certain union proposals concerning salary and benefits for employees at Department of Defense dependents schools were within the schools' duty to bargain under the Statute. In *Fort Stewart Schools* v. *FLRA*, 860 F.2d 396 (11th Cir. 1988), cert. granted, No. 89-65 (Oct. 2, 1989), the Eleventh Circuit examined the issues of whether these proposals concerned conditions of employment under Section 7103(a)(14) of the Statute; whether the proposals interfered with the agency's right to determine its budget under Section 7106(a)(1) of the Statute; and whether the proposals conflict with an agency regulation for which there is a "compelling need" within the meaning of Section 7117 (a)(2) and (b) of the Statute. The Eleventh Circuit affirmed the Authority's determination of negotiability. In addition to *NRC*, *supra*, referenced at p. 11 n.3, above, the same issue regarding the negotiability of pay and fringe benefits for certain employees was decided adversely to the Authority in *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989). Another case involving the same issue is pending in the Ninth Circuit. *Department of the Army, United States*

cuit, in a unanimous decision, enforced the Authority's order and denied the petition for review filed by the Fort Stewart Schools. *Fort Stewart Schools* v. *FLRA*, 860 F.2d 396 (11th Cir. 1988), cert. granted, No. 89-65 (Oct. 2, 1989).

In a memorandum filed on September 1, 1989, in response to the petition for a writ of certiorari in *Fort Stewart Schools* v. *FLRA*, *supra*, the Authority urged that the Eleventh Circuit's decision was correct. However, in view of the conflict in the circuits and the importance of the issue, the Authority indicated that it did not oppose granting the petition. The Court granted the petition for a writ of certiorari in *Fort Stewart Schools* v. *FLRA*, cert. granted, No. 89-65 (Oct. 2, 1989), and the case is currently being briefed.

## CONCLUSION

The instant petition for a writ of certiorari should be held and disposed of in light of the disposition in *Fort Stewart Schools* v. *FLRA*, cert. granted, No. 89-65 (Oct. 2, 1989).[3]

Respectfully submitted.

WILLIAM E. PERSINA *
*Acting Solicitor*

JILL A. GRIFFIN
*Attorney*

* Counsel of Record

NOVEMBER 1989

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*Army Support Command, Hawaii, Fort Schafter, Hawaii* v. *FLRA*, Nos. 88-7004 and 88-7158 (9th Cir., oral argument held Jan. 10, 1989).

[3] The Acting Solicitor General authorizes the filing of this petition.

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## SIXTH CIRCUIT

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Nos. 87-3395, 87-3524

FORT KNOX DEPENDENT SCHOOLS,
PETITIONER/CROSS-RESPONDENT,

*v.*

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT/CROSS-PETITIONER,

and

FORT KNOX TEACHERS ASSOCIATION,
INTERVENOR.

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Argued May 12, 1988

Decided May 11, 1989

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Before WELLFORD, BOGGS and NORRIS, Circuit Judges.

WELLFORD, Circuit Judge.

This is a dispute about the authority of the Federal Labor Relations Authority (FLRA) under the Federal Service Labor-Management Relations Act (FSLMRA) to order the United States Army, oper-

ating Fort Knox, Kentucky, and its base school system, to bargain with the teachers and their union over salary. A similar dispute about certain employees working at military facilities has been the subject of a number of recent decisions by other federal circuit courts which differ materially as to results reached and the basis for the disparate opinions and analysis. Because we believe after a careful consideration of these decisions that those which have reversed the FLRA in like situations are correct in their analysis of the statute and regulations involved, we reverse the order in this case appearing at 25 F.L.R.A. (No. 95) 203 (1987) (WESTLAW, FLB-FLRA database).

It is clear that we need not defer to the FLRA's interpretations and legal conclusions in this case, because "such deference only applies when the FLRA interprets the FSLMRA." *Fort Stewart Schools v. F.L.R.A.*, 860 F.2d 396, 419 (11th Cir. 1988); *see West Point Elementary School Teachers Association v. F.L.R.A.*, 855 F.2d 936, 940 (2d Cir. 1988); *Shanty Town Associates Limited Partnership v. E.P.A.*, 843 F.2d 782, 790 n. 12 (4th Cir. 1988); *Department of the Treasury, Bureau of Engraving and Printing v. F.L.R.A.*, 838 F.2d 1341, 1342 (D.C.Cir. 1988); *Department of the Navy, Military Sealift Command v. F.L.R.A.*, 836 F.2d 1409, 1410 (3d Cir. 1988); *New Jersey Air National Guard v. F.L.R.A.*, 677 F.2d 276, 281-82 & n. 6 (3d Cir.), *cert. denied*, 459 U.S. 988. 103 S.Ct. 343, 74 L.Ed.2d 384 (1982); *Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981).

The issues here are not confined to interpretation of the law or regulations thereunder which create FSLMRA or FLRA, and FLRA is not entitled to the ordinary deference afforded an agency decision or

interpretation when it "resolves a conflict between the FSLMRA and another statute" or a regulation promulgated under another statute. *West Point*, 855 F.2d at 940, 942; *see also Department of the Treasury*, 838 F.2d at 1342; *Sealift*, 836 F.2d at 1410; *Veterans Administration Medical Center v. F.L.R.A.*, 732 F.2d 1128, 1132 n. 7 (2d Cir. 1984). Our procedure, then, is to review the applicable law and regulations in this dispute in a fashion that other courts have described as "de novo" or "plenary." *Department of the Treasury*, 838 F.2d at 1342; *Sealift*, 836 F.2d at 1410; *see also Creque v. Luis*, 803 F.2d 92, 93 (3d Cir. 1986).

On the other hand, at issue in this controversy along with FSLMRA is the appropriate interpretation of 20 U.S.C. § 241 [1] by the Army, the agency charged with the responsibility for carrying out this statute. The Army has issued its regulation, AR 352-3, 1-7,[2] in

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[1] 20 U.S.C. § 241 states, in pertinent part:

> . . . To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia.

[2] The Army's interpretation of 20 U.S.C. § 241, as stated in the Army regulation, is:

> Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following

carrying out the statutory mandate. It is the Army, rather than FLRA, which may be entitled to deference in the construction of § 241, because "[n]ormally, an agency's interpretation of the statute it administers is entitled to deference, provided that the interpretation is a permissible constructon of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 [104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984)]." *Sealift*, 836 F.2d at 1410; *see Jones v. Board of Education Cleveland City School District*, 474 F.2d 1232 (6th Cir. 1973). This court, then, owes no particular deference to FLRA in reaching our decision as to the meaning of § 241. Instead, it is the Army's interpretation which is entitled to deference. The Army has interpreted 20 U.S.C. § 241 to mean that there may be no bargaining over "salary schedules" or wages. *See* AR 352-3, 1-7 (reprinted *supra* n. 2).

One statute in question, which FLRA has interpreted in its decision on appeal, requires bargaining over "conditions of employment," defined as "personnel policies, practices and matters . . . affecting working conditions." 5 U.S.C. § 7103(a)(14). Absent from this statute mandating bargaining by federal agencies with its employees is any word of "wages," "pay," "rates of pay," or "salary." If, as did the Third Circuit in *Sealift*, one compares the above language in § 7103 to the language in 29 U.S.C. § 158 (d) of the National Labor Relations Act, it must be deemed that the phrase "conditions of employment," as defined in FSLMRA, "implies a narrower range of bargainable matters under the [above] Labor Man-

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factors are, to the maximum extent practicable, equal: * * * h. Salary schedules.

AR 352-3, 1-7.

agement Statute than under NLRA." 836 F.2d at 1416 n. 14. The FSLMRA itself "does not specifically include 'pay' or 'pay practices' as bargainable matters." *Id.* at 1416. We agree with the *Sealift* court that "[t]he history [of FSLMRA] is replete . . . with indications that *Congress did not intend* to subject pay of federal employees to bargaining." *Id.* at 1417 (emphasis added). A detailed analysis of the legislative history of FSLMRA reveals that " 'wages, fringe benefits, and numbers of employees in an agency' remain beyond the scope of collective bargaining" by federal departments and agencies. *Id.* at 1418 (quoting 124 Cong.Rec. H9639 (daily ed. Sept. 13, 1978) and citing House Reports, Senate Reports, and statements of Congressmen Clay, Udall, Ford, and Devinski, and of Senator Sasser): *see* 124 Cong.Rec. S14,281 (daily ed. Aug. 24, 1978); *Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service, Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 914 (1979) [hereinafter *Legislative History*]; *see also Department of the Treasury v. F.L.R.A.*, 838 F.2d 1341, 1342-43 (D.C. Cir. 1988) (stating that it agreed with this interpretation reached "after examining incisively the language and legislative history" of FSLMRA).[3] We conclude that wages and other com-

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[3] Contrary to the implication of Judge Boggs, the *Sealift* and *Department of the Treasury* decisions are based squarely on an analysis of FSLMRA. Both cases hold that wages and compensation matters are outside the duty to bargain under FSLMRA apart from considerations of the Prevailing Rate Act. *See Department of the Treasury*, 838 F.2d at 1342-43; *Sealift*, 836 F.2d at 1419-20.

pensation matters with regard to federal employees fall outside the duty to bargain under 5 U.S.C. §§ 7101-7135 (FSLMRA). In this respect we agree with the rationale of Judge Starr expressed in *Department of Defense Dependents Schools v. F.L.R.A.*, 863 F.2d 988, 988 (D.C. Cir. 1988).[4]

Not only do the words of the statute, when contrasted with NLRA and other statutes dealing with the duty to bargain, fail to include wages and rates of compensation as a condition of employment, the legislative history of the statute indicates that Congress intended the omission. More than that, logic indicates that Congress would not leave to various federal agencies the authority to expand the budgets and fiscal limitations placed upon those agencies by requiring them to bargain about increases in pay and fringe benefits once budget boundaries were set by the Congress. It is obvious that salary and fringe benefits are the items most likely to involve substantial overspending if left to collective bargaining, particularly with respect to a school system for minor dependents of United States military and civilian personnel.

*Fort Stewart Schools v. F.L.R.A.*, 860 F.2d 396 (11th Cir. 1988), reaches a contrary result by relying basically on FLSA authority, including the decision involved in the instant appeal.[5] In its analysis of

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[4] This opinion is now the subject of an *en banc* review by the District of Columbia circuit.

[5] "Because this FLRA decision is within its authority, we must defer to its conclusion unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Fort Stewart*, 860 F.2d at 400 (referring to *Fort Knox Teachers Association and Fort Knox Dependent Schools*, 28 F.L.R.A. (No. 29) 179 (1987) (WESTLAW, FLB-FLRA

legislative history, Judge Hatchett concedes that Congressman Devinski "stated that wages and fringe benefits remained beyond the scope of collective bargaining[,] 124 Cong.Rec. H9639 (daily ed. Sept. 13, 1978) (remarks of Rep. Devinski); *Legislative History* at 935[,]" and that Congressman Clay "stated that 'employees *still* . . . cannot bargain over pay[,]' 124 Cong.Rec. E4293 (daily ed. Aug. 3, 1978 (remarks of Rep. Clay); *Legislative History* at 935." 860 F.2d at 402 (emphasis in original). We find the rationale of *Fort Stewart* to be unconvincing, particularly in its observation that "the Army could maintain cost parity and educational comparability despite *wide variations* in teachers' salaries" without indicating how this legerdemain might be accomplished. *Id.* at 403 (emphasis added). *Fort Stewart* gave no deference to the Army's interpretation of § 241, and the court concluded that "section 241 requires equality only to the maximum extent possible, not exact equality." *Id.* at 405. We decline to defer to FLRA rather than the Army in deciding whether or not a union's proposals on higher salary or overtime pay would not "infringe on an agency's right to determine its budget merely because the proposed matter will increase the agency's costs." *Id.* at 423.

In addition to FLRA decisions, the Second Circuit's holding in *West Point*, 855 F.2d 936, was the basis for the *Fort Stewart* opinion. *See* 860 F.2d at 403, 405. The *West Point* decision is dubious because it relied upon the FLRA decision at issue in the instant

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database)). The court also relied upon *West Point Elementary School Teachers Association v. F.L.R.A.*, 855 F.2d 936, 942 (2d Cir. 1988), observing that "the Second Circuit implicitly adopted the FLRA's conclusion that the FSLMRA does not bar negotiation of proposals involving compensation and fringe benefits." 860 F.2d at 401.

appeal, and cited no authority for its assertion that "cost parity [between the Army base schools and public schools] be maintained despite wide variation in what teachers are paid." *See* 855 F.2d at 943. There is no legislative history analysis set out in *West Point*. Instead, the court relied on unsupported assertions that wage or salary increases would not "necessarily result in increased costs to the Army." *Id.* at 944. The court concluded that the Army did not have a compelling need to regulate teacher salaries and that the court's interpretation of § 241 did not interfere with the Army's right to determine its own budget. *Id.* at 943.

The Fourth Circuit has sent conflicting signals with regard to this issue. Initially, in *United States Department of Defense Dependent Schools, Ft. Bragg, N.C. v. F.L.R.A.*, 838 F.2d 129 (4th Cir. 1988), *rev'ing*, 25 F.L.R.A. 1132 (1987), the court carefully analyzed § 241 and held that the Army's regulation precluding wage bargaining implemented properly the mandate of the statute. That decision, however, was vacated after a stipulation to dismiss was filed. The Fourth Circuit then issued another opinion which seemed to reach a result contrary to that in *Fort Bragg*, although not in a military base school context. *Nuclear Regulatory Commission v. F.L.R.A.* 859 F.2d 302 (4th Cir. 1988). But, that decision has also been vacated for an *en banc* resolution. In any event, apart from the case under consideration, the defense dependents school cases involving similar issues have resulted in a split upon appellate consideration. There is, then, no "majority" view on the issues we now ponder.

For the reasons indicated, we adopt what we believe to be the better reasoned view. We accordingly REVERSE the decision of FLRA in this case.

BOGGS, Circuit Judge, dissenting:

This case is before us on a petition for review and application for enforcement of an order by the Federal Labor Relations Authority (FLRA). That order requires the Fort Knox Dependent Schools (the Army) to bargain with the Fort Knox Teachers Association (the union) regarding wages for teachers working overtime as chaperones during trips away from school property. The Army appeals that order, contending that federal statutes and regulations mandate that wages for teachers in federally supervised schools (Section 6 schools) be equal to the wages paid to teachers in the local school districts. 20 U.S.C. § 241.[1] The Army further argues that these statutes and regulations do not permit negotiation regarding wages. The FLRA and the union contend that all conditions of employment, including wages, must be negotiated, subject only to overarching statutory controls on costs. The FLRA also argues that its interpretation of the relevant statutes and regulations should be afforded great deference. Because I believe, after a careful consideration of decisions in related cases by other courts of appeals, that those courts

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[1] 20 U.S.C. § 241 states, in pertinent part:

> . . . To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska and Hawaii, comparable to free public education provided for children in the District of Columbia.

which have upheld the FLRA in like situations are correct in their analysis of the statute and regulations involved, I dissent, and would affirm the order in this case appearing at 25 F.L.R.A. (No. 95) 203 (1987) (WESTLAW. FLB-FLRA database).

The first issue to be addressed in this case is the degree of deference a reviewing court must afford FLRA decisions. The FSLMRA states that the standard of review of FLRA decisions is the same as that contained in the Administrative Procedure Act (APA). 5 U.S.C. § 7123(c). The APA states that an agency's decision should not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1982). This high degree of deference to FLRA determinations is justified because "Congress has specifically entrusted the [FLRA] with the responsibility to define the proper subjects for collective bargaining [under the FSLMRA], drawing upon its expertise and understanding of the special needs of the public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983).

However, the FLRA's expertise does not extend beyond its interpretations of its own enabling statute, the FSLMRA. *Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988). When an agency "interprets another agency's statute or resolves a conflict between its own statute and the statute of another agency," *Sealift*, 836 F.2d at 1410, such a high degree of deference is not justified.

Thus, the FLRA is entitled to great deference regarding its interpretation of the FSLMRA. How-

ever, the Army, and not the FLRA, must be given that same deference with respect to 20 U.S.C. § 241.[2] With these constraints in mind, I now proceed to a consideration of the merits of the FLRA order.

Although this is a question of first impression in this jurisdiction, a number of decisions by other courts provide us with guidance in determining whether the salaries of teachers in Section 6 schools is a proper subject for bargaining. The Third Circuit and the District of Columbia Circuit both have held that wages are exempt from bargaining under the FSLMRA. *Sealift*, 836 F.2d at 1420; *Department of Treasury, Bureau of Engraving and Printing v. FLRA*, 838 F.2d 1341, 1343 (D.C. Cir. 1988); *Department of Defense Dependent Schools v. FLRA*, 863 F.2d 988, 994 (D.C. Cir. 1988). However, both *Sealift* and *Treasury* involved employees whose wages were determined by the Prevailing Rate Act. *Sealift*, 836 F.2d at 1411; *Treasury*, 838 F.2d at 1342. Both courts held in those cases that the Prevailing Rate Act "renders . . . wages unbargainable." *Treasury*, 838 F.2d at 1343; *Sealift*, 836 F.2d at 1420. The involvement of the Prevailing Rate Acts in those cases makes them entirely distinguishable from the case at hand. I recognize that in *Department of Defense*, the District of Columbia Circuit, in a case

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[2] The Army's interpretation of 20 U.S.C. § 241 is put forth in Army Regulation 352-3, 1-7, which states:

> Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:
>
> * * * * * *
>
> h. Salary schedules.

much like the instant one, decided to follow *Sealift* and *Treasury*, finding that the legislative history indicated that Congressional intent was to exempt pay from negotiability under the FSLMRA. *Defense*, at 994 n. 12. However, in my judgment, that decision underestimated the importance of the Prevailing Rate Acts in the *Sealift* and *Treasury* decisions. The Prevailing Rate Acts are what rendered wages unbargainable in those cases, not the courts' interpretations of the FSLMRA. *Treasury*, 838 F.2d at 1343; *Sealift*, 836 F.2d at 1420. Thus, reliance on those decisions in a case which does not involve a Prevailing Rate Act is inappropriate.

However, other Circuits have decided cases which more closely match the instant case in that no Prevailing Rate Act or other distinguishing factor was present. The majority chooses to disagree with recent decisions of the Second and Eleventh Circuits. *West Point Elementary School Teachers Association v. FLRA*, 855 F.2d 936 (2d Cir. 1988); *Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988). I respectfully disagree with the majority's conclusions, and choose to follow what appears to me to be the better-reasoned view.

In *West Point*, the court reached what I see as a more sensible decision, which is consistent with my reading of the relevant legislative history. The court first noted that the term "conditions of employment" in § 7102(2) is defined in § 7103(a)(14)(C) of the FSLMRA to mean " 'personnel policies, practices, and matters . . . affecting working conditions, except that such term does not include policies, practices, and matters . . . to the extent such matters are specifically provided for by Federal statute.' " 855 F.2d at 947 (quoting 5 U.S.C. § 7103(a)(14)(C)). Thus,

the court held that "because salary for teachers at Section 6 schools is not specifically provided for by federal statute, it is a condition of employment, over which employees have a right to bargain." *Ibid.*

The court then proceeded to examine 20 U.S.C. § 241 and AR 352-3, 1-7, concluding that neither the statute nor the regulation required a contrary result. As regards § 241, the court stated that "cost parity may be maintained despite wide variation in what teachers are paid." *Id.* at 943. "Similarly, educational comparability may be maintained even with wide variations in teachers' pay." *Ibid.* Thus, the court found that § 241 does not establish salary rates and, thus, the "Army has the duty under 5 U.S.C. § 7117(a) to bargain in good faith over the salary schedules for teachers." *Ibid.*

Regarding AR 352-3, 1-7, the court found that there was no compelling need for this regulation, noting that the duty to bargain prevails over regulations unless the regulation serves a "compelling need" of the agency. *Ibid.* (citing 5 U.S.C. § 7117(a)(2)). The court then relied on the definition of "compelling need" set out in 5 C.F.R. § 2424.11(a), (c), finding that § 241 did not mandate specific salaries, nor render the question of salaries nondiscretionary. *Ibid.* Again explaining that comparability of education or cost per pupil does not mandate equivalence in teachers' salaries, *ibid.*, the court found that there was no compelling need for that regulation.

The Eleventh Circuit reached the same conclusion in *Fort Stewart* based on a nearly identical analysis. *Fort Stewart*, at 406. In addition, that court noted aspects of the legislative history of the FSLMRA that, I believe, refute the District of Columbia Circuit's comments to the contrary in *Department of*

*Defense*. First, the court noted that the National Labor Relations Act (NLRA) allows bargaining over "'wages, hours and *other* terms and conditions of employment.'" *Id.* at 400 (citing 29 U.S.C. § 158(d) (Supp.1988) (emphasis added)). The court reasoned that the use of the word "other" demonstrated that wages and hours were two examples of "conditions of employment." *Ibid.* The court then continued, demonstrating that the remarks relied on by the District of Columbia Circuit were made with the "understanding that Congress generally regulates such matters through its prevailing rate acts, not with the understanding that the FSLMRA barred all wage negotiations." *Id.* at 401. The court concluded that "Congress intended the FSLMRA to continue the existing practices regarding the negotiation of wages." *Ibid.* Although those existing practices generally did not allow bargaining over wages, *ibid.*, the court noted that there were "existing practice[s which] allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits." *Id.* at 402 (citations omitted). The court reasoned that Congress must have known of these practices. *Ibid.* Thus, the court concluded that "Congress did not intend to preclude bargaining over wages and related benefits." *Ibid.*

I agree with this reading of the legislative history of the FSLMRA, as well as with the interpretation of § 241 by the Second and Eleventh Circuits. A comparable education does not require equal wages. A cost-per-pupil limitation in the aggregate does not preclude variation in an individual component of total cost, wages. 20 U.S.C. § 241(a) & (c). As the FLRA reasoned, as long as salary differentials

are compensated for in other budget items, the total costs can remain comparable. As an obvious example, a federal school system could hire more qualified (and more expensive) teachers, but maintain a higher pupil-teacher ratio. This reasoning leads to the conclusion that § 241 does not mandate that salaries of teachers in Section 6 schools be equal to those of teachers in surrounding public schools. Further, this reasoning demonstrates the lack of a "compelling need" for AR 352-3, 1-7(h).[3]

Therefore, I would hold that the Army must negotiate with the union over the union's proposal regarding overtime wages for teachers who volunteer for chaperone duty. I see this conclusion as entirely consistent with both the FSLMRA and § 241. Further, it does not conflict with any "compelling need" on the part of the Army. Thus, I would order that the FLRA order be enforced, and deny the Army's cross-petition for relief.

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[3] I note that 20 U.S.C. § 241 was amended in 1985, when Congress directed that all Section 6 schools be transferred "to the local school districts of the States in which such schools are located" by July 1, 1990. Act of December 3, 1985, Pub.L. No. 99-167, § 824, 99 Stat. 992 (1985). Thus, any decision reached by this court or any other courts of appeals likely will be only temporary, and will expire with the implementation of the July 1990 transfer.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 87-3395/3524

FORT KNOX DEPENDENT SCHOOLS,
PETITIONER, CROSS-RESPONDENT,

*v.*

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT, CROSS-PETITIONER,

FORT KNOX TEACHERS ASSOCIATION,
INTERVENOR-RESPONDENT, CROSS-PETITIONER.

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ORDER

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[Filed August 10, 1989]

Before: WELLFORD, BOGGS and NORRIS, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion

for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs adheres to his dissent.

Entered by Order of the Court

/s/ Leonard Green
LEONARD GREEN, Clerk

**APPENDIX C**

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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Case No. O-NG-845

FORT KNOX TEACHERS ASSOCIATION, UNION

and

FORT KNOX DEPENDENT SCHOOLS, AGENCY

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## DECISION AND ORDER ON NEGOTIABILITY ISSUE

### I. *Statement of the Case*

This case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues as to the negotiability of a single proposal.

### II. *Proposal*

> Voluntary bus chaperone duty shall be in effect. Should no volunteers be available, a randomly selected list of teacher-chaperones shall be drawn from among all teachers at the school requiring chaperone duty. Duty will rotate in

order according to the list. The same list will be used from one year to the next so that chaperone duty is equitably distributed among all teachers. Overtime at time and one half shall be the rate of compensation to any teacher performing bus chaperone duty which goes beyond the normal school day. Overtime compensation shall be provided all employees performing such duty, whether on a voluntary or roster basis.

III. *Positions of the Parties*

The Agency contends that the petition should be dismissed because it is procedurally defective. Substantively, the Agency asserts that that portion of the proposal which relates to the assignment of bus chaperone duty conflicts with its management right to assign employees. It also asserts that the portion of the proposal which relates to compensation for such duty (1) conflicts with law; (2) conflicts with an agency regulation for which a compelling need exists; and (3) does not concern a condition of employment within the meaning of the Statute.

The Union states that the bus chaperone duty to which the proposal refers does not relate to supervising the loading and unloading of school busses on a daily basis, which the Union concedes is encompassed within the regular duties of teachers. Rather, the proposal refers to bus chaperone duty when a teacher accompanies students travelling by bus to extracurricular activities such as sports events, band activities, and field trips. The Union denies that the proposal conflicts with management rights, law or regulation and argues that it concerns a condition of employment.

IV. *Analysis and Conclusions*

A. *Procedural Issue*

The Agency has filed a motion to dismiss the petition in this case based on the alleged failure of the Union to serve the head of the agency in a timely manner in accordance with the provision of section 2424.4(b) of the Authority's Rules and Regulations. We deny the motion for the following reasons. The Agency's claim centers on the Union's failure to serve the Department of Defense. However, the record indicates that the petition was served on, among others, the Deputy Director, Labor-Management Relations, Department of Defense, as well as the Agency officials who issued the Agency's allegation of nonnegotiability and signed the Agency statement of position which was submitted to the Authority. In these circumstances, noting particularly that the Agency has not contended that it was in any way prejudiced by the manner in which the Union served the petition, we find that service of the petition was adequate. *See American Federation of Government Employees, AFL-CIO, Local 3904 and Department of the Army and Air Force, National Guard Bureau*, 15 FLRA 270 (1984).

B. *The First Portion of the Proposal Conflicts with the Agency's Management Rights*

This portion of the proposal states:

> Voluntary bus chaperone duty shall be in effect. Should no volunteers be available, a randomly selected list of teacher-chaperones shall be drawn from among all teachers at the school requiring chaperone duty. Duty will rotate in order according to the list. The same list will be

used from one year to the next so that chaperone duty is equitably distributed among all teachers.

The Union contends that no specific skills or qualifications are necessary for bus chaperone duty and, therefore, this portion of the proposal is nothing more than a procedure by which the Agency will exercise its right to assign employees.

It is not clear to us from the language of the proposal and the record as a whole whether the proposal is concerned with the assignment of work, under section 7106(a)(2)(B), or the assignment of employees, under section 7106(a)(2)(A). However, whether the proposal is intended to apply to assignment of employees to positions—assign employees—or to assignment of work or duties to employees—assign work—it is nonnegotiable in either case. The Authority has held that the right under section 7106(a)(2)(A) to assign employees includes the discretion to determine the particular qualifications and skills needed to perform the work, and to make judgments in determining whether a particular employee meets those qualifications. *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,* 2 FLRA 603, 612-14 (1980) *enforced sub nom. Department of Defense v. Federal Labor Relations Authority,* 659 F.2d 1140, 1148-49 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA,* 455 U.S. 945 (1982). The Authority has also found that the same discretion is inherent in the right under section 7106(a)(2)(B) to assign work. *Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California,* 9 FLRA 703 (1982).

As explained by the Union this portion of the proposal presumes that there are no qualifications necessary to perform bus chaperone duties and, consequently, all teachers are equally qualified for those duties. Thus the proposal effectively deprives management of the discretion to make judgments as to (1) the personnel requirements of the work of the position, that is, the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment, and (2) as to which employees meet those requirements. Rather, this portion of the proposal would compel the Agency to assign bus chaperone duties to volunteers or to all teachers on a rotational basis. It therefore conflicts with management's rights under section 7106(a)(2) to assign employees and to assign work. *See American Federation of Government Employees, National Council of Social Security Administration Field Operations Locals, AFL-CIO and Social Security Administration, Office of Field Operations, Baltimore, Maryland,* 17 FLRA 11 (1985) (Proposal 2). *Compare National Cemetery Office,* 9 FLRA 703 (1982), in which the contract provisions involved reserved to the agency the discretion to determine which employees were qualified to perform specific work. The Authority held that those provisions did not conflict with the Statute by requiring that, where two or more equally qualified employees were available, assignment would be based on seniority.

V. *The Second Portion of the Proposal*

The Members of the Authority disagree over the negotiability of this portion of the proposal. The Decision and Order of the Authority is on page 5

of this decision. Chairman Calhoun's opinion is on page 11.

VI. *Order*

The Union's petition for review is dismissed insofar as it concerns that portion of the proposal which addresses the manner in which bus chaperone duties will be assigned.

Issued, Washington, D.C., February 27, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Jean McKee
JEAN MCKEE, Member

Federal Labor Relations Authority

## DECISION AND ORDER ON THE SECOND PORTION OF THE PROPOSAL

### I. *The Proposal*

Overtime at time and one half shall be the rate of compensation to any teacher performing bus chaperone duty which goes beyond the normal school day. Overtime compensation shall be provided all employees performing such duty, whether on a voluntary or roster basis.

### II. *Analysis and Conclusion*

#### A. *This Portion of the Proposal Is Within the Duty to Bargain*

This portion of the proposal would require compensation on an overtime basis when bus chaperone duties go beyond the normal school day. For the reasons which follow, we find this portion of the proposal is within the duty to bargain.[1]

##### 1. *This Aspect of the Proposal Does Not Conflict with Law*

The Agency asserts that this part of the proposal conflicts with 20 U.S.C. § 241 and 5 U.S.C. § 5542. We find that it conflicts with neither provision.

###### a. *20 U.S.C. § 241*

Section 241 of title 20 relevantly requires that under specified circumstances the Secretary of Education shall make arrangements for providing a free public education for children residing on Federal

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[1] In finding this portion of the proposal negotiable, we make no judgment as to its merits.

property and children of members of the Armed Forces on active duty. It further provides that for purposes of providing such education personnel may be employed whose compensation and other incidents of the employment relationship may be fixed without regard to "the Civil Service act and rules" and specified portions of title 5. 20 U.S.C. § 241(a). Additionally, it states that "to the maximum extent practicable" the Secretary shall limit total payments made for such education within the Continental United States to an amount per pupil which does not exceed the amount spent in comparable communities in the State in which the school is located. 20 U.S.C. § 241(e).

The Agency contends that under these provisions the pay and benefits of teachers must be comparable to the pay and benefits of teachers in schools in comparable communities—in this case comparable communities in Kentucky. It contends that, because the payment of overtime as proposed would exceed the salaries and benefits provided teachers in such communities, the proposal conflicts with the limitations imposed by 20 U.S.C. § 241.

Additionally, it asserts, based on its interpretation of the legislative history underlying one of the laws [2] which established the provisions of 20 U.S.C. § 241, that one purpose of that particular law was to avoid paying teachers overtime. Specifically, it relies on the Senate Report accompanying the legislation which became law in which the committee "took note" of and reproduced a letter from the Secretary of the

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[2] Pub. L. No. 89-77, 79 Stat. 244 (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 257.

Army which concerned the legislation before it.[3] The letter expressed support for that portion of the legislation which provided for the employment, compensation and other conditions of employment of teachers to be established without regard to various Civil Service laws and rules. It noted that the proposed legislation reflected existing practice and cited some "illustrative" practices. Two of the illustrative practices cited were:

(1) No overtime pay because teachers were expected to devote whatever time was necessary to accomplish customary curricular and extracurricular activities; and

(2) addition of fixed amounts to their basic salaries as compensation for assigned extracurricular activities.

We find that the second portion of the proposal conflicts with neither the express terms of 20 U.S.C. § 241 nor the intent of Congress underlying that provision. First, with respect to the argument that the proposal would conflict with the express provisions of 20 U.S.C. § 241(e) by causing the Agency to exceed the limitations on the total per pupil costs of providing an education which are set forth therein, the Authority rejected the same argument in *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519 (1983), noting that compensation is only one aspect of total cost. As in *Fort Bragg*, the Agency in this case has not demonstrated that the proposal would necessarily prevent it from achieving the over-

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[3] S. Rep. No. 311, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 1910. Relevant portions appear as the Appendix to this Decision.

all cost limitations specified in 20 U.S.C. § 241(e).[4] Insofar as the proposal in the present case requires the payment of overtime compensation, it is materially to the same effect as Union Proposal 13 in *Fort Bragg*. Therefore, for the reasons set forth in *Fort Bragg* the Authority finds that the proposal does not conflict with the terms of 20 U.S.C. § 241.

Second, in our view, the Agency has not demonstrated by analysis of legislative history that Congress intended to prohibit the payment of overtime compensation such as that proposed herein. Rather, the Senate Report relied on by the Agency articulates the "purpose" of the legislation sought as being to except certain teachers from coverage under various provisions of law relating to civil service employment including, among others, those relating to pay. The statements quoted above of the Secretary of the Army specifically relating to overtime were merely "illustrative of some of the practices" relating to teacher employment which had been adopted by Department of Defense and which deviated from the provisions of statutes affecting Federal employees generally. We find nothing, however, in either the law or the legislative history relied upon by the Agency which persuades us that the Congress intended to codify any specific practices such as when to pay overtime.

b. *5 U.S.C. § 5542*

20 U.S.C. § 241(a) specifically excepts the teachers involved here from coverage under, among other

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[4] If, in combination with other practices and proposals relating to expenditures, such circumstances would result, the Agency has recourse to raising this argument before the Federal Service Impasses Panel in support of its position as to the merits of this and other proposals should an impasse occur in conjunction with negotiations.

provisions, 5 U.S.C. § 5542. The Agency's argument that the overtime compensation for these teachers is governed by the provisions of 5 U.S.C. § 5542 therefore is inapposite and need not be considered further.

2. *Compelling Need*

The Agency asserts that the proposal conflicts with a provision of its regulations which states that: [5]

> 1-7. *Compensation factors.* Education provided . . . will be considered comparable to free public education offered by selected communities in the State when the following portions are, to the maximum extent practicable, equal:
>
> . . . . . .
>
> h. Salary schedules.

It contends that salary schedules in contracts covering teachers in surrounding Kentucky communities list all compensable extracurricular activities and that bus chaperone duties are not among them. Consequently, it asserts that the proposal conflicts with its regulatory provision that the salary schedules be equal to those of the surrounding communities. It contends that this provision implements in a nondiscretionary manner a mandate of Congress to pattern personnel practices after those found in the non-Federal service teaching profession, not after those found in the Federal service, generally. It asserts therefore that there is a "compelling need" for the regulation under § 2424.11(c) of the Authority's regulations.

Assuming without deciding that the proposal conflicts with the Agency's regulation, we find that the Agency has not established a compelling need under

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[5] AR 352-3

§ 2424.11(c) of the Authority's regulations. The Agency's argument on this point is essentially based on the same interpretation of the legislative history of Pub. L. No. 89-77 which we rejected in section C(1)(a). That is, the Agency concludes, based on Pub. L. No. 89-77 and the language of the committee report cited in note 4, above, that Congress intended that the compensation practices of public schools in comparable communities in the state in which the particular dependent school is located must be applied to the teachers at the dependent school. As set forth above, the Agency has not established that the language of 20 U.S.C. § 241 or the intent of Congress in enacting the provisions in question mandates adoption of any specific employment or compensation practices. Consequently, we cannot find that the Agency's regulation reflects the nondiscretionary implementation of a mandate of Congress. Thus, we hold that the Agency has not demonstrated that a compelling need exists for its regulation to bar negotiations on this proposal.

3. *Conditions of Employment*

We find that the Agency has not supported its argument that the proposal as it relates to premium pay does not concern conditions of employment. In support of its argument it asserts that:

(1) "premium pay" is specifically provided for by law, *i.e.*, in title 5; and

(2) Congress did not intend pay to come within the ambit of "conditions of employment."

As to the Agency's first assertion, we noted previously that 20 U.S.C. § 241 explicitly excludes teachers from coverage under the provisions governing

overtime found at 5 U.S.C. § 5542. Consequently, we reject the Agency's argument here that the overtime provisions of title 5 specifically provided for the overtime of the employees to whom the proposal would apply.

Turning to the second assertion, we recently reaffirmed that nothing in the Statute or its legislative history bars negotiation of proposals concerning compensation of employees insofar as (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exist. *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 FLRA No. 41 (1986). *petition for review filed sub nom. Department of the Air Force, Eglin Air Force Base, Florida v. FLRA*, No. 87-3073 (11th Cir. Feb. 2, 1987).

Hence, we find that the portion of the proposal concerning overtime pay concerns a condition of employment about which as noted in section A(1)(a) above, the Agency has discretion pursuant to 20 U.S.C. § 241. *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519 (1989).

4. *Summary and Conclusions*

This portion of the proposal, which would require compensation on an overtime basis for bus chaperone duties which extend beyond the normal school day, duties is within the duty to bargain. This portion of the proposal concerns a condition of employment

about which the Agency has discretion under 20 U.S.C. § 241. Further, it does not conflict with either 20 U.S.C. § 241 or 5 U.S.C. § 5542 as asserted by the Agency. Lastly, we find that it does not conflict with an Agency regulation for which a compelling need has been established by the Agency.

III. *Order*

The Agency must negotiate upon request, or as otherwise agreed to by the parties, over that portion of the proposal which addresses compensation for bus chaperone duty.

Issued, Washington, D.C., February 27, 1987.

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Jean McKee
JEAN MCKEE, Member

Federal Labor Relations Authority

*Separate Opinion of Chairman Calhoun*

In my opinion in *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 FLRA No. 41 (1986), *petition for review filed sub nom. Department of the Air Force, Eglin Air Force Base, Florida v. FLRA*, 87-3073 (11th Cir. February 2, 1987), I stated that in the absence of a clear expression of Congressional intent to make wages and money-related fringe benefits negotiable, I would find that these matters are not within the duty to bargain under the Statute. I find no such expression in this case. Therefore, I do not join the majority.

Issued, Washington, D.C., February 27, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN, Chairman

## APPENDIX

S. Rep. No. 311, 89th Cong., 1st Sess. provides in relevant part:

Section 2 of H.R. 5874, if enacted, would modify conditions of employment of teachers in dependents' schools in the United States. In adopting section 2 as an amendment to H.R. 5874 the committee took note of the request contained in correspondence under date of March 4, 1965, received from the Honorable Stephen Ailes, Secretary of the Army, reproduced below:

Department of the Army,
Washington, D.C.

Hon. Hubert H. Humphrey,
President of the Senate.

Dear Mr. President: A draft of legislation to amend section 6(a) of the act of September 30, 1950, relating to conditions of employment of teachers in dependents' schools, is enclosed.

This proposal is part of the Department of Defense's legislative program for the 89th Congress and thhe Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this proposal for the consideration of the Congress. The Department of the Army has been designated as the representative of the Department of Defense for this legislation.

It is recommended that the proposal be enacted by the Congress.

### PURPOSE OF THE LEGISLATION

The purpose of the proposed legislation is to amend section 6(a) of the act of September 30, 1950, chapter 1124, as amended (20 U.S.C. 241(a)), to provide

that the employment, compensation, and other conditions of employment of teachers engaged under that section 6 may be established without regard to the Civil Service Act and rules (5 U.S.C. 631), the Classification Act of 1949 as amended (5 U.S.C. 1071), the Annual and Sick Leave Act of 1951, as amended (5 U.S.C. 2061), the Federal Employees Pay Act of 1945, as amended (5 U.S.C. 901), the Veterans' Preference Act of 1944, as amended (5 U.S.C. 851), and the Performance Rating Act of 1950, as amended (5 U.S.C. 2001).

* * * *

The military services had considered that the present language of section 6 was sufficiently broad to permit the extension of the salary fixing system and pay and leave practices applicable in public schools' jurisdictions to its teachers in the dependents' schools. Employment practices and contract clauses have been established, therefore, to reflect the practices which exist in the public schools. However, they vary considerably from the provisions of statutes affecting Federal employees generally. The following are illustrative of some of these practices:

* * * *

(c) No provision is made for overtime pay since teachers are expected to devote whatever time is necessary to preparation for class sessions, grading of papers, and other customary curricular and extracurricular activities.

(d) Fixed amounts are added to the teachers' basic salary to compensate for extracurricular activities which they are assigned.

* * * *

The Comptroller General has ruled Comp. Gen. B-138773, May 15, 1959) that the general language of

section 6 exempts school personnel only from the Civil Service Act and rules, as amended, and the Classification Act of 1949, as amended, and that other laws which affect Federal employees continue to apply to personnel in the dependents' schools. In his letter to the Secretary of Defense, dated November 13, 1961 Comp. Gen. B-146622), the Comptroller General stated further that the present practices could be continued temporarily with the understanding that clarifying legislation would be developed and presented for consideration during the 2d session of the 87th Congress. A legislative proposal was submitted to the Congress on June 7, 1962, and resubmitted on January 29, 1963; however, there was no action taken with respect to the proposal.

Based upon the Department's experience in operating section 6 schools, it is highly desirable that the personnel practices for instructional personnel be patterned after those usually encountered in the teaching profession rather than those which have been developed for the Federal service as a whole. The attached draft legislation would provide clear legislative authority considered necessary to permit continuation of present practices.

## APPENDIX D

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, AS AMENDED, 5 U.S.C. §§ 7101-7135 (1988); AND 5 U.S.C. § 241 (1982)

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**§ 7103. Definitions; application**

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation

Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title, and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority; or
(G) the Federal Service Impasses Panel;

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercise such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with

respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election, or

(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee en-

gaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

**§ 7105. Powers and duties of the Authority**

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropirate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of

this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, at-

torneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

**§ 7106. Management rights**

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

**§ 7114. Representation rights and duties**

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written

document embodying the agreed terms; and to take such steps as are necessary to implement such agreement.

(c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

**§ 7117. Duty to bargain in good faith; compelling need; duty to consult**

(a) (1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any

Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance wih the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefore at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

**§ 7119. Negotiation impasses; Federal Service Impasses Panel**

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fails to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

**§ 7123. Judicial review; enforcement**

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order in-

volves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authroity. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be consid-

ered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business

for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

**§ 7135. Continuation of existing laws, recognitions, agreements, and procedures**

(a) Nothing contained in this chapter shall preclude—

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or

under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

**20 U.S.C. § 241 (1982)**

**§ 241. Education of children where local agencies cannot supply facilities**

(a) Necessary arrangements by Secretary; standard of education

In the case of children who reside on Federal property—

(1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or

(2) if it is the judgment of the Secretary, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children,

the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. Such arangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local

governmental authority and it is the judgment of the Secretary, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children. To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of chapter 53 of title 5; (2) subchapter I of chapter 63 of title 5; (3) sections 5504, 5541 to 5549, and 6101 of title 5; (4) sections 1302(b), (c), 2108, 3305(b), 3306(a)(2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7512, and 7701 of title 5; and (5) chapter 43 of title 5. Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia. In any case where education was being provided on January 1, 1955, or there-

after under an arrangement made under this subsection for children residing on an Army, Navy (including the Marine Corps), or Air Force installation, it shall be presumed, for the purposes of this subsection, that no local educational agency is able to provide suitable free public education for the children residing on such installation, until the Secretary and the Secretary of the military department concerned jointly determine, after consultation with the appropriate State educational agency, that a local educational agency is able to do so.

(b) Education of children in adjacent areas

In any such case in which the Secretary makes such arrangements for the provision of free public education in facilities situated on Federal property, he may also make arrangements for providing free public education in such facilities for children residing in any area adjacent to such property with a parent who, during some portion of the fiscal year in which such education is provided, was employed on such property, but only if the Secretary determines after consultation with the appropriate State educational agency (1) that the provision of such education is appropriate to carry out the purposes of this subchapter, (2) that no local educational agency is able to provide suitable free public education for such children, and (3) in any case where in the judgment of the Secretary the need for the provision of such education will not be temporary in duration, that the local educational agency of the school district in which such children reside, or the State educational agency, or both, will make reasonable tuition payments to the Secretary for the education of such children. Such payments may be made either directly or through

deductions from amounts to which the local educational agency is entitled under this subchapter, or both, as may be agreed upon between such agency and the Secretary. Any amounts paid to the Secretary by a State or local educational agency pursuant to this section shall be covered into the Treasury as miscellaneous receipts.

(c) Education of children whose parents are employed in certain Territories and Possessions

In any case in which the Secretary makes arrangements under this section for the provision of free public education in facilities situated on Federal property in Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, or the Virgin Islands, he may also make arrangements for providing free public education in such facilities for children residing with a parent employed by the United States in a grade, position, or classification subject by policy and practice to transfer or reassignment to areas where English is the language of instruction in the schools normally attended by children of Federal employees. Dependents of excepted service professional employees of the schools shall be eligible to attend the schools. In any case where education is being provided under an arrangement made under this subsection, it shall be presumed that no local educational agency is able to provide suitable free public education for the children of eligible parents employed by the United States until the Secretary determines, after consultation with the appropriate State educational agency, that a local educational agency is able to do so.

(d) Restrictions on making arrangements

The Secretary may make an arrangement under this section only with a local educational agency or with the head of a Federal department or agency administering Federal property on which children reside who are to be provided education pursuant to such arrangement or, in the case of children to whom the second sentence of subsection (a) of this section applies, with the head of any Federal department or agency having jurisdiction over the parents of some or all of such children. Except where the Secretary makes arrangements pursuant to the second sentence of subsection (a) of this section, arrangements may be made under this section only for the provision of education in facilities of a local educational agency or in facilities situated on Federal property. The Secretary shall ensure that funds provided under such arrangement or arrangements are expended in an efficient manner, and shall require an accounting of funds by such agency at least on an annual basis. The Secretary shall further be provided with data relating to the quality and type of education provided to such children under such arrangement or arrangements.

(e) Limit on payments

To the maximum extent practicable, the Secretary shall limit the total payments made pursuant to any such arrangement for educating children within the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State. The Secretary shall limit the total payments made pursuant

to any such arrangement for educating children outside the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the amount he determines to be necessary to provide education comparable to the free public education provided for children in the District of Columbia.

(f) Children living on Federal property

If no tax revenues of a State or of any political subdivision of the State may be expended for the free public education of children who reside on any Federal property within the State, or if no tax revenues of a State are allocated for the free public education of such children, then the property on which such children reside shall not be considered Federal property for the purposes of sections 238 and 239 of this title. If a local educational agency refuses for any other reason to provide in any fiscal year free public education for children who reside on Federal property which is within the school district of that agency or which, in the determination of the Secretary, would be within that school district if it were not Federal property, there shall be deducted from any amount to which the local educational agency is otherwise entitled for that year under section 238 or 239 of this title an amount equal to (1) the amount (if any) by which the cost to the Secretary of providing free public education for that year for each such child exceeds the local contribution rate of that agency for that year, multiplied by (2) the number of such children.

(g) Elective school boards

The Secretary shall ensure the establishment of an elective school board in schools assisted under this

section. Such school board shall be composed of a minimum of three members, elected by the parents of students in attendance at such school. The Secretary shall, by regulation, establish procedures for carrying out such school board elections as provided in this subsection.

(h) School board oversight of school expenditures and operations

A school board established pursuant to subsection (g) of this section shall be empowered to oversee school expenditures and operations, subject to audit procedures established by the Secretary, and other provisions of this section.

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No. 89-736

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

*v.*

FORT KNOX DEPENDENT SCHOOLS, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE FORT KNOX DEPENDENT SCHOOLS

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## QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a)(14).

2. Whether a proposal concerning overtime compensation for teachers at a school for dependents of Army personnel is contrary to 20 U.S.C. 241—which provides that education at the dependents schools is to be comparable to that at local public schools and that, to the maximum extent practicable, the per pupil costs at the dependents schools should not exceed the per pupil costs at schools in comparable communities in the State—because the proposal does not purport to be based on prevailing practices at local public schools.

3. Whether there is a "compelling need" for an Army regulation providing that, to the maximum extent practicable, the compensation of teachers at the dependents schools is to be equal to compensation at local public schools.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 875 F.2d 1179. The opinion of the Federal Labor Relations Authority (Pet. App. 18a-35a) is reported at 25 F.L.R.A. 1119.

### JURISDICTION

The judgment of the court of appeals was entered on May 11, 1989. A petition for rehearing was denied on August 10, 1989 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on November 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

During contract negotiations, the Fort Knox Teachers Association, which represents teachers at the school for dependents of Army personnel stationed at the base, proposed that teachers performing bus chaperone duty be paid overtime at the rate of time and one half. The Army declined to negotiate over the proposal. It contended that proposals relating to compensation are not negotiable because compensation is not a "condition[ ] of employment" within the meaning of 5 U.S.C. 7103(a)(14), which defines the phrase to include "personnel policies, practices, and matters * * * affecting working conditions." The Army also contended that the proposal, which did not purport to be based on prevailing practices in the local public schools, was contrary to 20 U.S.C. 241, which provides that education at the dependents schools is to be comparable to that at public schools in the State where the school is located and that education at the dependents schools should be provided at a cost per pupil that, to the maximum extent practicable, does not exceed the per pupil cost at comparable public schools. In addition, the Army contended that the proposal is not negotiable because it is contrary to Army Reg. 352-3, 1-7(h), which provides that the compensation paid to teachers at the dependents schools is to be comparable to that paid at local public schools, and because there is a "compelling need" for the regulation within the meaning of 5 U.S.C. 7117(a)(2).

The Federal Labor Relations Authority rejected each of the Army's contentions and held the proposal negotiable. Chairman Calhoun dissented. He contended that compensation is not a negotiable condition of employment under 5 U.S.C. 7102(2). Pet. App. 32a.

The court of appeals reversed. Pet. App. 1a-15a. It concluded that "wages and other compensation matters with

regard to federal employees fall outside the duty to bargain." *Id.* at 5a-6a. It held in the alternative that "the Army's regulation precluding wage bargaining implemented properly the mandate" of Section 241. Pet. App. at 8a. Judge Boggs dissented, disagreeing with the majority on both points. *Id.* at 9a-15a.

## DISCUSSION

The FLRA asks the Court to hold this case for disposition in light of No. 89-65, *Fort Stewart Schools* v. *FLRA* (argued Jan. 10, 1989). While we believe that the decision below is correct, we agree that the petition should be held while *Fort Stewart* is pending.

The dispute in *Fort Stewart* also arose at a dependents school after a union made certain proposals relating to the compensation of teachers. The Eleventh Circuit held that wages are negotiable "conditions of employment" and that there is no "compelling need" for the Army's regulation requiring wages, "to the maximum extent practicable," to be equal to those at local public schools. 860 F.2d 396 (1988). Thus, the first and the third questions presented in this case are identical to questions presented in that case, and the second question presented here is closely related to the third question presented in both cases. In light of the similarities between the two cases, the holding in *Fort Stewart* is likely to control here.

## CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of No. 89-65, *Fort Stewart Schools* v. *FLRA*.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

JANUARY 1990

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* The Solicitor General is disqualified in this case.

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